MOTION FILED
AUG - 6 2004

(3)

No. 03-1039

IN THE

Supreme Court of the United States

THOMAS GOUGHNOR,
Acting Warden, California State Prison at San Quentin,
Petitioner,

vs.

WILLIAM CHARLES PAYTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: chuckhob@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

QUESTIONS PRESENTED

1) What is the proper approach under 28 U. S. C. § 2254(d) for evaluating the use of analogous Supreme Court opinions by state courts?

2) Is a state court opinion an unreasonable application of clearly established law when it relies on a Supreme Court opinion much closer to the facts of the case than any other clearly established Supreme Court precedent to affirm the sentence?

IN THE

Supreme Court of the United States

THOMAS GOUGHNOR,
Acting Warden, California State Prison at San Quentin,
Petitioner,

vs.

WILLIAM CHARLES PAYTON,
Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITIONER

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation* respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petitioner. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim

---

* This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the all too familiar problem of a federal habeas court failing to accord the appropriate deference due to a state court opinion under 28 U. S. C. § 2254(d). The Ninth Circuit dismissed the California Supreme Court's opinion affirming Payton's sentence because it relied on *Boyde* v. *California*, 494 U. S. 370 (1990), the closest Supreme Court decision to the facts of the case, due to a handful of factual differences between the two cases. In essence, the Ninth Circuit held that reasoning by analogy was unreasonable in this case. This is contrary to the intent of Congress, the integrity of state court convictions, and the principle that the state courts and lower federal courts are coequal interpreters of the federal Constitution. It transforms § 2254(d)'s highly deferential standard into virtual de novo review. Therefore, overturning this decision is consistent with the interests of justice and public safety that the CJLF seeks to advance.

August, 2004

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

TABLE OF CONTENTS

Questions presented i

Motion for leave to file iii

Interest of *amicus curiae* iii

Table of authorities vii

Brief of *amicus curiae* 1

Summary of facts and case 1

Summary of argument 5

Argument 7

I

A state court's decision to rely on a distinguishable, but analogous, Supreme Court decision can be reasonable under 28 U. S. C. §2254(d) 7

II

It was reasonable for the California Supreme Court to rely on *Boyde* v. *California* by analogy 13

A. *Boyde* 14

B. Similarities and Differences 16

1. Similarities 16

2. Differences 17

a. Time 17

b. Context 20

C. General and Specific 22

III

The California Supreme Court's decision is a reasonable application of the clearly established Supreme Court precedent 23

Conclusion 27

TABLE OF AUTHORITIES

Cases

Boyde v. California, 494 U. S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990) ..... Passim

Blystone v. Pennsylvania, 494 U. S. 299, 108 L. Ed. 2d 255, 110 S. Ct. 1078 (1990) 14

Darden v. Wainwright, 477 U. S. 168, 91 L. Ed. 2d 144, 106 S. Ct. 2464 (1986) 21

Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U. S. 727, 135 L. Ed. 2d 888, 116 S. Ct. 2374 (1996) 13

Donnelly v. De Christoforo, 416 U. S. 637, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974) 21

Early v. Packer, 537 U. S. 3, 154 L. Ed. 2d 263, 123 S. Ct. 362 (2002) 7

Eddings v. Oklahoma, 455 U. S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982) 13, 22, 23, 26

Greer v. Miller, 483 U. S. 756, 97 L. Ed. 2d 618, 107 S. Ct. 3102 (1987) 21

Harmelin v. Michigan, 501 U. S. 957, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991) 10

Lindh v. Murphy, 521 U. S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997) 10, 13

Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978) 7, 13, 22, 26

Lockyer v. Andrade, 538 U. S. 63, 155 L. Ed. 2d 144, 123 S. Ct. 1166 (2003) 7, 10, 11, 25

Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) 8

Mitchell v. Esparza, 540 U. S. 12, 157 L. Ed. 2d 263, 124 S. Ct. 7 (2003) 26

Payton v. Woodford, 299 F. 3d 815 (CA9 2002) 4

Payton v. Woodford, 346 F. 3d 1204 (CA9 2003) 3, 5, 13, 17, 18, 20, 21

Penry v. Lynaugh, 492 U. S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989) 13, 15, 22, 23, 26

People v. Payton, 3 Cal. 4th 1050, 13 Cal. Rptr. 2d 526, 839 P. 2d 1035 (1992) ..... Passim

Price v. Vincent, 538 U. S. 634, 155 L. Ed. 2d 877, 123 S. Ct. 1848 (2003) 8, 24

Ruhrgas AG v. Marathon Oil Co., 526 U. S. 574, 143 L. Ed. 2d 760, 119 S. Ct. 1563 (1999) 12

Rummel v. Estelle, 445 U. S. 263, 63 L. Ed. 2d 382, 100 S. Ct. 1133 (1980) 10, 11, 25

Skipper v. South Carolina, 476 U. S. 1, 90 L. Ed. 2d 1, 106 S. Ct. 1669 (1986) 13, 22

Solem v. Helm, 463 U. S. 277, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983) 10, 11, 25

Texas v. Cobb, 532 U. S. 162, 149 L. Ed. 2d 321, 121 S. Ct. 1335 (2001) 18

United States v. Young, 470 U. S. 1, 84 L. Ed. 2d 1, 105 S. Ct. 1038 (1985) 21

Williams v. Taylor, 529 U. S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000) 12

Woodford v. Garceau, 538 U. S. 202, 155 L. Ed. 2d 363, 123 S. Ct. 1398 (2003) 4, 7

Woodford v. Payton, 538 U. S. 975, 155 L. Ed. 2d 662, 123 S. Ct. 1785 (2003) 4

Woodford v. Visciotti, 537 U. S. 19, 154 L. Ed. 2d 279, 123 S. Ct. 357 (2002) 10, 12, 24

Woodson v. North Carolina, 428 U. S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) 18

Yarborough v. Alvarado, 541 U. S. __, 158 L. Ed. 2d 938, 124 S. Ct. 2140 (2004) 7, 8, 9, 10, 23

Yarborough v. Gentry, 540 U. S. 1, 157 L. Ed. 2d 1, 124 S. Ct. 1 (2003) 7

State Statute

Cal. Penal Code § 190.3(k) 3

Treatise

1 W. LaFave, Substantive Criminal Law (2d ed. 2003) ... 19

Miscellaneous

E. Levi, An Introduction to Legal Reasoning (1948) 13

IN THE

Supreme Court of the United States

THOMAS GOUGHNOR,
Acting Warden, California State Prison at San Quentin,
Petitioner,

vs.

WILLIAM CHARLES PAYTON,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

SUMMARY OF FACTS AND CASE

On May 26, 1980, at around 4:00 a.m., Patricia Pensinger, was sitting in her kitchen working on a crossword puzzle because she was unable to sleep. *People* v. *Payton*, 3 Cal. 4th 1050, 1057, 839 P. 2d 1035, 1039 (1992). She lived at home with her three sons and some boarders. Pensinger heard someone entering the front door, and found William Charles Payton, who said he had car problems and wanted to talk to her. See *ibid.* Payton and his wife were once boarders in the house. See *ibid.* While they talked, Pamela Montgomery entered the kitchen and was introduced to Payton. Payton had about three beers during the conversation. At around 4:50 a.m., Payton asked if he could sleep on the couch. Pensinger agreed and then went to sleep in her bedroom. See *ibid.*

Payton later went to Pensinger's bedroom and attacked her with a knife, repeatedly stabbing her in the face and neck. See

ibid. Her 10-year-old son, Blaine, tried to protect his mother, but he was also stabbed by Payton. Pensinger yelled, " 'Take me, leave my son.' " Payton tried to stab Pensinger in the abdomen but the knife was bent, so he left the room, yelling, " 'I'm leaving now.' " *Ibid.* Pensinger then told her son that she would distract Payton and that he should try to escape. She went to the kitchen and found Payton, who had found a second knife and began stabbing her again. Payton finally fled when another of Pensinger's sons woke up and she yelled for him to wake up a male boarder. See *ibid.*

"Patricia suffered 40 stab wounds to her neck, back, and chest. Blaine suffered 23 stab wounds to his face, neck, and back. Both survived." *Ibid.* Pamela Montgomery was found in her bedroom, where she had been raped and murdered. She had "12 stab wounds, including 6 in line from her stomach to her pubic area." *Id.*, at 1058, 839 P. 2d, at 1039. Saliva and semen that could have been Payton's were found on Montgomery's body. Payton's fingerprint was found on a bottle of beer in the kitchen. *Id.*, at 1058, 839 P. 2d, at 1039-1040. Payton's wife testified that he had come home at 6:15 a.m. covered with blood. *Id.*, at 1058, 839 P. 2d, at 1040. When Payton took his clothes off, his wife noticed that his genital area was covered with blood, as were his legs and other parts. *Ibid.* Payton also confessed to the crime to an inmate at the Orange County jail. See *ibid.*

Payton was convicted of first-degree murder, rape, and two counts of attempted murder. The jury also found the special circumstance that the murder was committed during a rape. See *id.*, at 1056, 839 P. 2d, at 1038-1039. At the penalty phase, the defense presented evidence that since his arrest and custody in jail he had become a deeply committed Christian. See *id.*, at 1059, 839 P. 2d, at 1040. A deputy sheriff testified that he led Bible study classes in jail, and four inmates testified about Payton's beneficial influence. See *ibid.*

California's death penalty law lists a variety of mitigating factors for the sentencing jury to consider, including what is

called "factor (k)," which reads: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Penal Code § 190.3(k). "The trial court refused the defense counsel's request to modify the instruction to refer specifically to 'evidence of the defendant's character background, history, mental condition and physical condition.' " *Payton*, 3 Cal. 4th, at 1069, 839 P. 2d, at 1047. While it agreed with defense counsel that factor (k) allowed the jury to consider such evidence, the court did not wish to vary the standard instruction from the exact words of the statute. See *ibid.*

"During closing argument, the prosecutor incorrectly argued that factor (k) referred to 'some factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did' but not 'to anything after the fact or later.' " *Ibid.* At another point, the prosecutor stated: " 'What I am getting at, you have not heard during the last few days any legal evidence of mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all. You have not heard any evidence of mitigation in this trial.' " *Payton* v. *Woodford*, 346 F. 3d 1204, 1209 (CA9 2003) (en banc). At the conclusion of the argument, "the prosecutor told the jury that he did not 'want to spend too much time on [Payton's religious conversion] because I don't think it's really applicable and I don't think it comes under any of the eleven factors.' " *Ibid.*

Defense counsel objected to the prosecution's comments about factor (k) and moved for a mistrial. The trial court denied the motion, but instructed "the jury that 'the comments by both the prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective.' " *Ibid.* During closing argument, defense counsel vigorously asserted that the defendant's conversion was proper mitigating evidence. See *Payton*, 3 Cal. 4th, at 1072, 839 P. 2d, at 1049.

The California Supreme Court affirmed his conviction and sentence. See *id.*, 3 Cal. 4th, at 1056, 839 P. 2d, at 1039. It rejected Payton's claim that the prosecutor's comments led the jury to think that they were not allowed to consider his mitigating evidence. See *id.*, at 1069, 839 P. 2d, at 1047. The California Supreme Court analyzed Payton's claim under this Court's decision holding that factor (k) satisfied the Eighth Amendment, *Boyde* v. *California*, 494 U. S. 370 (1990). See *Payton*, 3 Cal. 4th, at 1070, 839 P. 2d, at 1048. Applying *Boyde*, the prosecutor's remarks would be "constitutional error only if it is reasonably likely that such remarks led the jurors to understand the trial court's instructions as precluding consideration of relevant mitigating evidence offered by the defendant." *Id.*, at 1070-1071, 839 P. 2d, at 1048. The court concluded that it was not reasonably likely that the jurors were misled by the prosecutor's argument. See *id.*, at 1071, 839 P. 2d, at 1048.

Payton filed a federal habeas corpus petition, and the District Court rejected his guilt phase claims but vacated his death sentence. See *Payton* v. *Woodford*, 299 F. 3d 815, 819 (CA9 2002) (en banc). A three-judge panel of the Ninth Circuit Court of Appeals reversed the District Court's penalty phase ruling. See *ibid.* Sitting en banc, the Ninth Circuit reversed the panel's ruling on the penalty phase. See *ibid.* It held that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") did not apply to Payton's habeas claims because he filed a petition for appointment of counsel before the AEDPA took effect. See *id.*, at 822. Considering the merits *de novo*, the court divided 6-5 on whether the California Supreme Court's decision was correct. See *id.*, at 830; *id.*, at 838 (Tallman, J., dissenting). After *Woodford* v. *Garceau*, 538 U. S. 202 (2003) overturned the Ninth Circuit's rule on applicability of AEDPA in these circumstances, this Court granted certiorari, vacated, and remanded for reconsideration in light of *Garceau*. See *Woodford* v. *Payton*, 538 U. S. 975 (2003).

On remand, the Ninth Circuit again vacated the death sentence in an en banc ruling. It held that the California Supreme Court's reliance on *Boyde* was an unreasonable application of this Court's precedent because "*Boyde* did not directly address the question here—whether on its face, the unadorned factor (k) instruction is unconstitutionally ambiguous as applied to *post-crime* evidence." *Payton*, 346 F. 3d, at 1212 (emphasis in original). The en banc court held that the California Supreme Court's conclusion under *Boyde*, that there was not a reasonable likelihood that the jury was misled, was an unreasonable application of clearly established United States Supreme Court precedent.

This Court granted certiorari on May 24, 2004.

SUMMARY OF ARGUMENT

This case demonstrates the importance of determining the appropriate level of specificity for the relevant clearly established law in § 2254(d) analysis. Normally, defining the relevant body of clearly established law at a high level of abstraction should favor deference to the state court decision. However, where there is a close, but distinguishable, Supreme Court precedent that supports the state court decision, then defining the law at a very general level can defeat § 2254(d)'s deferential standard. This is what the Ninth Circuit did in the present case.

A state court's decision to follow a close Supreme Court precedent is usually reasonable. In *Lockyer* v. *Andrade*, the case before the state court was between two Supreme Court precedents. The state court chose the precedent that supported affirming the sentence, and this Court held it reasonable under § 2254(d). This illustrates how a federal habeas court is supposed to give the benefit of the doubt to the state court opinion. Allowing state courts to apply analogous cases is part of that deference.

It was reasonable for the California Supreme Court to rely on *Boyde* v. *California* by analogy. The two cases have considerable similarities: they both analyzed the same instruction, in each case the defendant's entire mitigation case consisted of non-crime evidence, the prosecutor implicitly conceded that the jury would weigh the aggravating and mitigating evidence in both, the court instructed the jury to consider all the evidence in each case, and in both cases defense counsel argued that the jury can consider the mitigating evidence under factor (k).

The differences in time and context do not change the result. While *Boyde* did not address whether post-crime evidence can be considered under factor (k), it recognized that the instruction's language is naturally broad. Factor (k)'s language allows jurors to consider non-crime evidence like Payton's conversion to Christianity.

The effect of the prosecution's comments in the closing argument is no different. The Ninth Circuit's assertion that only judicial instruction can counteract improper comments by counsel is contradicted by *Boyde* and other decisions. What matters is the context of the entire trial, which in this case neutralizes any adverse influence of the prosecutor's comments.

The California Supreme Court's decision satisfies § 2254(d). The case for reasonableness is even stronger here than in *Andrade*. While that decision involved a case between two Supreme Court precedents, the present case is far closer to *Boyde* than any other Supreme Court precedent. This is exactly the type of decision Congress meant to protect when it passed § 2254(d).

ARGUMENT

I. A state court's decision to rely on a distinguishable, but analogous, Supreme Court decision can be reasonable under 28 U. S. C. § 2254(d).

This case demonstrates that the best intentioned rule cannot achieve what its authors desire if it is improperly implemented. The Ninth Circuit's difficulty with implementing the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is known to this Court. See, *e.g.*, *Yarborough* v. *Alvarado*, 541 U. S. __, 158 L. Ed. 2d 938, 124 S. Ct. 2140 (2004); *Yarborough* v. *Gentry*, 540 U. S. 1 (2003) (*per curiam*); *Woodford* v. *Garceau*, 538 U. S. 202 (2003); *Lockyer* v. *Andrade*, 538 U. S. 63 (2003); *Early* v. *Packer*, 537 U. S. 3 (2002) (*per curiam*). This case involves the Ninth Circuit's refusal to defer to the California Supreme Court opinion simply because California's high court relied on a decision from this Court that is much closer than any other Supreme Court precedent, but still partially distinguishable from the present case. The Ninth Circuit's opinion misstates this precedent and improperly declares the California high court's opinion unreasonable because it reasoned by analogy.

The primary problem with the Ninth Circuit's decision is its emphasis on elevating this Court's more general Eighth Amendment decisions at the expense of the decision which is the closest to the facts of the present case. Its decision to rely on *Lockett* v. *Ohio*, 438 U. S. 586 (1978) and other cases establishing the general right to have the sentencer consider the relevant mitigating evidence improperly discounts the much more relevant decision of *Boyde* v. *California*, 494 U. S. 370 (1990). By focusing on the more general precedent, while distinguishing *Boyde*, the Ninth Circuit effectively substituted its opinion of the Eighth Amendment for the California Supreme Court's. The existence of factual differences with a Supreme Court opinion does not render that opinion irrelevant

under § 2254(d). What matters is the degree of difference and how the opinion is used.

Any approach to determining the appropriate level of abstraction under § 2254(d) should be tailored to the special characteristics of that deferential standard. Section 2254(d) establishes a two-step test for determining whether the state court properly identified the controlling Supreme Court precedent and applied it in an objectively reasonable manner. See *Price* v. *Vincent*, 538 U. S. 634, 640-641 (2003). Since § 2254(d) governs federal review of state court interpretations of the relevant clearly defined law, defining the law at a relatively high level of abstraction actually increases the likelihood of deferring to the state court judgment when the test is applied correctly. See *Alvarado*, 158 L. Ed. 2d, at 951, 124 S. Ct., at 2149.

However, if a habeas court does not apply the appropriate deference to the state court opinion, then defining the relevant law at a high level of abstraction can make it easier to grant habeas in some cases. If there is a Supreme Court opinion much closer to the facts of the case than any other decision of this Court, and that decision supports the result in the state court opinion, the habeas court will have to distinguish that case before it can grant habeas under § 2254(d). Defining the relevant clearly established law at a high level of generality allows the habeas court to bypass the more specific decision. If the habeas court then does not apply the appropriate deference to the state court opinion, it is actually easier to disagree with the state court opinion at this higher level of abstraction. This is what the Ninth Circuit did in this case, and it is inconsistent with this Court's application of § 2254(d).

Alvarado affirms that habeas courts must pay attention to the level of specificity of the governing Supreme Court precedent under § 2254(d). That case addressed whether the state court acted unreasonably in holding that the defendant was not in custody for the purpose of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). See *Alvarado*, 158 L. Ed. 2d, at 946, 124 S. Ct., at

2144. The Ninth Circuit held that the state court decision was an unreasonable application of Supreme Court precedent because it failed to take into account the defendant's juvenile status and lack of prior history of arrest or interrogation when determining the custody question. See *id.*, at 949, 124 S. Ct., at 2147. It concluded that since juvenile status was relevant to the voluntariness of a confession or the waiver of the self-incrimination privilege, failing to apply this principle to the custody question was unreasonable. See *ibid.* In reversing this decision, this Court provided guidance for approaching the "clearly established" question under § 2254(d).

> "At the same time, the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Id.*, at 951, 124 S. Ct., at 2149.

The rule governing *Miranda* custody is a general one, whether a reasonable person would feel free to leave under the circumstances of the interrogation. See *id.*, at 952, 124 S. Ct., at 2150. The Ninth Circuit's holding ignored the greater deference accorded to state courts applying general rules by attaching a more specific rule regarding juvenile status found in the law of voluntary confessions and waiver of rights that was not present in the general rules governing *Miranda* custody. However, a confession's voluntariness and the validity of a waiver contain an "important conceptual difference" from *Miranda* custody. See *id.*, at 953, 124 S. Ct., at 2151. Extending these more specific foreign concepts undercuts the more general custody inquiry. Under the circumstances

of the case, the state court's conclusion that Alvarado was not in custody was reasonable, and "[t]he Court of Appeals was nowhere close to the mark when it concluded otherwise." *Id.*, at 952, 124 S. Ct., at 2150.

Narrower precedent can be used to support convictions and sentences. A precedent can bolster the argument that the state court opinion is reasonable even if that precedent is factually distinguishable. The more favorable treatment of precedent supporting the state court decision is acceptable because § 2254(d) is meant to favor state court decisions. In § 2254(d), Congress created a "highly deferential standard for reviewing state-court rulings." *Lindh* v. *Murphy*, 521 U. S. 320, 333, n. 7 (1997). If the question is unsettled, then § 2254(d) "demands that state court decisions be given the benefit of the doubt." *Woodford* v. *Visciotti*, 537 U. S. 19, 24 (2002) (*per curiam*). Giving supportive precedent a more favorable treatment than precedent that is hostile to the state court opinion is consistent with the intent of Congress.

This Court has applied that principle to the badly conflicted law governing Eighth Amendment challenges to prison sentences. *Andrade*, *supra*, addressed an Eighth Amendment challenge to two consecutive 25-to-life sentences under California's Three Strikes law. See 538 U. S., at 66. The Ninth Circuit held that the state court's decision upholding the sentence was an unreasonable application of clearly established federal law. See *id.*, at 70. A major problem with this ruling was the deeply conflicted state of the precedents governing Eighth Amendment challenges to noncapital sentences. As this Court noted, "our precedents in this area have not been a model of clarity." *Id.*, at 72. Between the conflicting results in *Rummel* v. *Estelle*, 445 U. S. 263 (1980) and *Solem* v. *Helm*, 463 U. S. 277 (1983), and the lack of any majority opinion in *Harmelin* v. *Michigan*, 501 U. S. 957 (1991), there was little clearly established Supreme Court precedent, except at a very general level. "Thus, in this case, the only relevant clearly established law amenable to the 'contrary to' or 'unreasonable

application of' framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case." *Andrade*, 538 U. S., at 73 (quoting *Harmelin*, 501 U. S., at 1001 (Kennedy, J., concurring in part and concurring in the judgment)).

Rummel and *Solem* were the cases closest to Andrade's. *Rummel* involved a life sentence for a nonviolent offender under a recidivist sentencing scheme. See 445 U. S., at 264-265. The life sentence was subject to the possibility of parole within 12 years, see *id.*, at 280-281, and was upheld against Eighth Amendment attack by this Court. See *id.*, at 285. *Solem* involved a life sentence without possibility of parole for a nonviolent offender sentenced under a habitual criminal scheme, see 463 U. S., at 279, which the *Solem* Court struck down as violating the Eighth Amendment. See *id.*, at 303.

Andrade's case implicated factors found in both *Solem* and *Rummel*. See 538 U. S., at 73. Unlike *Solem*, there was the possibility of parole for Andrade, but his 50-to-life sentence was more severe than the life with possibility of parole in 12 years in *Rummel*. Thus, Andrade's case was between the two decisions, materially distinguishable from both. See *id.*, at 73-74.

The state court opinion upholding Andrade's sentence based its holding on *Rummel*. Since *Solem* did not overrule *Rummel*, the state court decision was not contrary to the clearly defined legal principles. See *ibid.* That decision was also reasonable. Given the broad discretion to the legislature under the governing legal principles, affirming Andrade's sentence "was not objectively unreasonable . . . ." *Id.*, at 76.

Andrade demonstrates that a case can support a state court decision under § 2254(d) even though it is not precisely on point. While the case was between a Supreme Court decision affirming a sentence and one striking down a sentence, the state court's decision to follow the affirming decision, *Rummel*, was reasonable. It is true that *Andrade* was decided in a context that

was very favorable to upholding state court opinions, as the law was unclearly defined except at a very high level of abstraction, and that law was very deferential to prison sentences. Still, *Andrade* stands for the proposition that a state court can rely on a supporting opinion even if it is distinguishable from the case before it.

This reflects a common-sense approach to precedent under § 2254(d). Cases which are not distinguishable from one of this Court's precedents are easy. Section 2254(d) matters most in the grey areas between Supreme Court precedents. It is not enough for a federal court to disagree with a state court in order to grant habeas in such a case. See *Williams* v. *Taylor*, 529 U. S. 362, 411 (2000). Rather, the state court decision must be objectively unreasonable for habeas corpus to be granted. See *id.*, at 409. Where there is no contrary law on point, and there is an analogous precedent supporting a similar result, it is highly unlikely that it is objectively unreasonable to rely on the analogous precedent.

Under the AEDPA, state and lower federal courts are coequals in the development of constitutional law in criminal cases. The "primary responsibility" for applying this Court's precedents in state criminal cases is "with the state courts . . . ." *Visciotti*, 537 U. S., at 27. As this Court noted in another context, "federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S. 574, 586 (1999). Under § 2254(d) state courts can make reasonable decisions on unresolved questions in constitutional criminal procedure without fear of being second-guessed by the lower federal courts. Allowing state courts to follow close, but distinguishable, Supreme Court precedent is part of that process.

There are limits to this approach. While the § 2254(d) standard is very deferential to state court rulings, it is not a blank check. A state court cannot insulate an opinion from

habeas review simply by declaring the case analogous to a Supreme Court decision affirming a conviction.

Also, this is an approach to habeas cases, not a hard and fast rule. No bright-line rule can determine with precision when a Supreme Court precedent is sufficiently similar to the state court case to satisfy § 2254(d). However, extrapolating from one analogous precedent to another case is the essence of legal reasoning. See E. Levi, An Introduction to Legal Reasoning 1-2 (1948); *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 799-800 (1996) (Kennedy, J., concurring in part and dissenting in part). This common judicial function should not be difficult for courts to apply, and can help guide applications of § 2254(d).

II. It was reasonable for the California Supreme Court to rely on *Boyde* v. *California* by analogy.

The present case is before this Court because of a disagreement between the California Supreme Court and the Ninth Circuit Court of Appeals over one case. The California Supreme Court, like the Ninth Circuit, identified *Lockett* v. *Ohio*, 438 U. S. 586 (1978), *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and *Skipper* v. *South Carolina*, 476 U. S. 1 (1986) as establishing the general principle governing Payton's Eighth Amendment claim, that the capital defendant has the right to have the jury hear and consider relevant mitigating evidence. See *People* v. *Payton*, 3 Cal. 4th 1050, 1070, 839 P. 2d 1035, 1047 (1992); *Payton* v. *Woodford*, 346 F. 3d 1204, 1210 (CA9 2003). The Ninth Circuit also identified *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) as relevant, see 346 F. 3d, at 1210, but that case is not the reason for the conflict between the two courts.

Boyde v. *California*, 494 U. S. 370 (1990) is the reason for the Ninth Circuit's decision to grant habeas corpus. In spite of the "highly deferential" standard of 28 U. S. C. § 2254(d), see *Lindh* v. *Murphy*, 521 U. S. 320, 333, n. 7 (1997), the Ninth Circuit declared the California Supreme Court opinion to be an

unreasonable application of the clearly established Supreme Court precedent because it relied on *Boyde*, even though that decision is much closer to the present case than any other Supreme Court precedent. This is as inaccurate as it sounds. *Boyde* is sufficiently close to the present case to be highly relevant. The Ninth Circuit's dismissal of *Boyde*'s relevance is achieved only by misconstruing the opinion.

A. Boyde.

In *Boyde*, the defendant claimed that none of California's 11 enumerated mitigating factors allowed the sentencing jury to consider mitigating evidence that is not related to the crime, such as the defendant's background or character. See 494 U. S., at 378. The case centered on California's "catch-all" provision, "factor (k)." See *id.*, at 373-374, and n. 1.[1] The *Boyde* Court began its analysis by admitting that "[t]he legal standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence is less than clear from our cases." *Id.*, at 378. Since it was important to set a single standard, see *id.*, at 379, the Court settled on one formula, "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence." *Id.*, at 380. This standard reflected a careful balancing of interests. "There is, of course, a strong policy in favor of accurate determination in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Id.*, at 380.

Factor (k) satisfied this standard. See *id.*, at 381. Character and background evidence are relevant because it has long been

1. *Boyde* also addressed a second issue, whether the "shall impose a sentence of death" language in the standard jury instruction in capital cases violated the Eighth Amendment. See 494 U. S., at 376. This Court upheld this instruction under *Blystone* v. *Pennsylvania*, 494 U. S. 299 (1990). See *Boyde*, *supra*, at 377.

held by society that criminals whose crimes are attributable to their background or mental problems are less culpable than those lacking this excuse. See *Penry*, 492 U. S., at 319. Factor (k) allows the defendant "to argue that his background and character 'extenuated' or 'excused' the seriousness of the crime" and that the jurors would give effect to this evidence in the appropriate case. *Boyde*, 494 U. S., at 382. The instruction did not limit the jury consideration to circumstances of the crime. *Ibid.* Rather, "[t]he jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character." *Ibid.* (emphasis in original; footnote omitted).

Even if factor (k) had been less clear, the context of the case demonstrated that a reasonable juror would consider the defendant's evidence in mitigation. See *id.*, at 383. Since all of the defense's four-day-long defense consisted of character and background evidence, it was "unlikely that reasonable jurors would believe the court's instructions transformed all of this 'favorable testimony into a virtual charade.' " *Ibid.* (quoting *California* v. *Brown*, 479 U. S. 538, 542 (1987)). Also, as the jury was instructed to consider all of the evidence, it is not sensible to conclude that factor (k) would leave jurors constrained "to *ignore all* of the evidence." *Id.*, at 383-384 (emphasis in original).

The defense also claimed that the prosecutor's arguments just before the sentencing deliberation fatally undercut the strength of the factor (k) instruction. This did not change the analysis, as counsel's arguments typically carry less weight than the trial court's instructions. See *id.*, at 384. While it is possible that the prosecution's misrepresentations could have an impermissible effect on the jury, the fact remains that they have less force than instructions from the court. See *id.*, at 384-385. The *Boyde* Court analyzed the prosecutor's remarks in their context, see *id.*, at 385, and determined that they did not impermissibly alter the jury's consideration of the mitigating evidence. While the prosecution argued that the defendant's

evidence did not mitigate Boyde's crime, it never claimed that the jury could not consider this evidence. See *ibid.* The prosecution's argument implicitly recognized the relevance of the mitigating evidence and the defense argument advocated a very broad reading of factor (k). See *id.*, at 385-386. Therefore, the factor (k) instruction did not violate the Eighth Amendment. *Id.*, at 386.

B. Similarities and Differences.

1. Similarities.

There are many similarities between *Boyde* and the present case. Like *Boyde*, the present case involves California's former factor (k) instruction.[2] As in *Boyde*, the question is whether the instruction is broad enough to allow the jury to consider mitigating evidence not related to crime. See *People* v. *Payton*, 3 Cal. 4th 1050, 1069, 839 P. 2d 1035, 1047 (1992). Payton's mitigating evidence, like Boyde's, concerned his character. See *id.*, at 1059, 839 P. 2d, at 1040. In both cases, the non-crime evidence in question made up all of the defendant's mitigation case. See *id.*, at 1072, 839 P. 2d, at 1049. Payton's trial also contained an instruction that the jury consider all of the evidence. See *ibid.* His counsel argued that the jury could consider the mitigating evidence under factor (k). See *ibid.* In addition, other remarks in the prosecution's closing argument implied that the jury could weigh the defendant's mitigating evidence. See *id.*, at 1071-1072, 839 P. 2d, at 1049. Finally, both cases involved appellate attacks by the defense on the effect of the prosecution's closing argument on the jury's consideration of the mitigating evidence. See *id.*, at 1069, 839 P. 2d, at 1047.

---

2. California courts are now required to specifically instruct juries that they may consider any aspect of the defendant's record or character in mitigation when applying factor (k). See *Boyde*, 494 U. S., at 374, n. 2.

2. Differences.

Boyde and the present case are not identical. The most substantial difference is the prosecutor's argument. While the argument in *Boyde* was comparatively innocuous, the prosecution misstated the law in the present case by claiming that factor (k) did not refer to any mitigating effect occurring after the crime. See *ibid.* There is also a difference between the types of mitigating evidence in the two cases. Payton's conversion to Christianity, although related to his character, took place after his crime. Payton's conversion is not part of his background, and it is not an emotional or mental state that contributed to the crime. Therefore, it differs from the mitigating evidence in *Boyde*.

a. Time.

The Ninth Circuit pounced on these two differences. First it placed a heavy emphasis on the temporal differences between the mitigating evidence in *Boyde* and the present case. See *Payton* v. *Woodford*, 346 F. 3d 1204, 1211-1212 (CA9 2003). It further concluded that *Boyde* did not address whether an unadorned factor (k) instruction allows the jury to consider post-crime mitigating evidence. See *id.*, at 1212. The Ninth Circuit also asserted that the *Boyde* "Court explicitly distinguished the character and background evidence at issue there from evidence that 'pertain[s] to prison behavior after the crime for which [the petitioner] was sentenced to death as was the case in *Skipper*.' " *Ibid.* (quoting *Boyde*, 494 U. S., at 382, n. 5). Finally, the en banc panel held that "[a]ny natural reading of the words of the unadorned factor (k) does not support the inclusion of post-crime evidence because mitigating evidence occurring after a crime cannot possibly 'extenuate the gravity

of the crime.' " *Ibid.* The Ninth Circuit therefore ruled that *Boyde* could not apply to this case. *Ibid.*[3]

This considerably overstates the differences between *Boyde* and the present case. The *Boyde* Court did not "explicitly distinguish" post-crime mitigating evidence. Boyde's counsel did not brief, but raised at oral argument, the claim that factor (k) did not allow the jury to consider that Boyde had won a dance contest while in prison. See 494 U. S., at 382, n. 5. He asserted that this would be mitigating evidence under *Skipper*. See *ibid.* The *Boyde* Court dismissed this claim for two reasons. First, the evidence was introduced as part of his artistic ability, while in *Skipper* the evidence was that the defendant was a model prisoner and therefore not a danger to the community. *Id.*, at 383, n. 5. In addition, the dance prize was won before he committed the murder, unlike the post-crime evidence in *Skipper*. *Ibid.* This evidence was therefore similar to the other character evidence presented at trial, and so it was considered by the jury. See *ibid.*

The *Boyde* Court did not distinguish its holding from post-crime evidence because that type of evidence was never presented to it. Since any statement on this issue would be no more than dicta, the *Boyde* Court wisely chose not to address an issue it did not need to face. "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas* v. *Cobb*, 532 U. S. 162, 169 (2001). The *Boyde* decision did not state that factor (k) would address post-crime evidence, nor did it say that it did not. Contrary to

3. The Ninth Circuit's opinion states that post-crime mitigating evidence is distinguishable from pre-crime evidence, because it does not share "society's 'long held' views" as to its relevance, and therefore a presumption that a jury would interpret an ambiguous instruction to permit it is not justified. See 346 F. 3d, at 1212. Strong societal consensus is the basis of mitigation being a constitutional requirement in the first place. See *Woodson* v. *North Carolina*, 428 U. S. 280, 297-301 (1976) (lead opinion). If post-crime evidence really occupies the disfavored position the Ninth Circuit claims, then *Skipper* was wrongly decided and should be overruled.

the Ninth Circuit's conclusion, footnote 5 of *Boyde* does not foreclose applying factor (k) to post-crime mitigating evidence.

The Ninth Circuit's holding that the "natural reading" of factor (k) does not include post-crime evidence substitutes assertion for analysis. The factor (k) instruction reads: "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Payton*, 3 Cal. 4th, at 1069, 839 P. 2d, at 1047. The two key terms in this provision are "any other circumstance" and "extenuates the gravity of the crime." *Boyde* found both capable of an appropriately broad application by a sentencing jury. As to the former phrase, this Court noted that "[t]he jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character." 494 U. S., at 382 (emphasis in original).

Boyde's holding also prevents the second phrase from limiting factor (k)'s reach. If factor (k) does not allow the consideration of mitigating evidence, it is because the phrase "extenuates the gravity of the crime" requires the jury to tie the defendant's evidence to the crime before giving it mitigating effect. The *Boyde* Court's holding that factor (k) does not prevent the consideration of non-crime mitigating evidence, see 494 U. S., at 382, implicitly rejects this.

At trial, Boyde's "overall strategy [was] to portray himself as less culpable than other defendants due to his disadvantaged background and his character strengths in the face of those difficulties." *Id.*, at 383, n. 5. This works to mitigate two of the traditional theories of punishing crime—retribution and incapacitation. The retribution theory of punishment is the notion that the criminal should be punished for harming society, see 1 W. LaFave, Substantive Criminal Law § 1.5(a), pp. 41-43 (2d ed. 2003), while incapacitation holds that the criminal is a danger to society and should therefore be separated from it. See *id.*, at 1.5(a)(2), at 38. A person whose crime is attributable in part to a disadvantaged background is less responsible for the damage done to society by the crime, and his good character

decreases the need to segregate him from society through the ultimate form of incapacitation, the death penalty. Payton's evidence is similar to Boyde's in this respect. It is evidence of his good character, which demonstrates that he is no longer so dangerous to society that he needs permanent incapacitation. His good deeds in prison help society, and thus pays back some of the damage caused by his crimes, reducing the need for retribution. These similarities make *Boyde*, and its interpretation of factor (k), highly relevant to the present case.

b. Context.

The second difference cited by the Ninth Circuit, the prosecutor's comments, is a more substantial difference. However, it does not render *Boyde* irrelevant. The prosecutor's misstatement of California law cannot be excused, but it is only one part of the larger context of the penalty phase. *Boyde* demonstrates the need to look at the entirety of the proceedings to find the proper context for the instruction. See 494 U. S., at 383. Viewed in this light, the prosecutor's argument does not create a fatally wide gap between *Boyde* and the present case.

The Ninth Circuit provided several reasons for why the prosecutor's comments in this case rendered *Boyde* irrelevant. First, it noted that the *Boyde* Court found that the prosecutor's comments did not suggest " 'an impermissible interpretation of factor (k) . . . .' " See *Payton*, 346 F. 3d, at 1212 (quoting *Boyde*, 494 U. S., at 384-385)). While true, this only demonstrates that *Boyde* and the present case are not identical. The *Boyde* opinion recognized that "prosecutorial misrepresentations" may decisively influence the jury, but "they are not to be judged as having the same force as an instruction from the court." See 494 U. S., at 384-385. While this indicates that a prosecutor's arguments generally will not negate a court's instruction to consider the evidence, the Ninth Circuit ignores this natural reading, interjecting its own startling interpretation of *Boyde*. "According to *Boyde*, only instructions by the court

have the force to 'blunt' attorneys' comments." 346 F. 3d, at 1214, n. 13.

There is no foundation in *Boyde* for this naked assertion. After noting that the prosecutor's arguments could effect the jury's consideration of the mitigating evidence, the *Boyde* Court concluded that "like the instructions of the court," the prosecution's arguments "must be judged in the context in which they are made." 494 U. S., at 385. It cites several cases in support of this point, *Greer* v. *Miller*, 483 U. S. 756, 766 (1987), *Darden* v. *Wainwright*, 477 U. S. 168, 179 (1986), and *United States* v. *Young*, 470 U. S. 1, 11-12 (1985). See 494 U. S., at 385. In *Greer*, a "single question, an immediate objection, and two curative instructions" meant that there was no due process violation for prosecutorial misconduct. See 483 U. S., at 766. *Darden* placed the prosecution's closing arguments in the context of the defense counsel's arguments preceding it, see 477 U. S., at 179, while in *Young*, the prosecution's remarks were examined in the context of defense counsel's improper remarks which invited the prosecutorial misconduct. See 470 U. S., at 11-12. As the *Young* Court noted, "the remarks must be examined within *the context of the trial* to determine whether the prosecution's behavior amounted to prejudicial error." *Id.*, at 12 (emphasis added); see also *Donnelly* v. *DeChrisotophoro*, 416 U. S. 637, 639 (1974) (determining whether "remarks, in the *context of the entire trial*, were sufficiently prejudicial to violate respondent's due process rights" (emphasis added)).

Boyde evaluated the factor (k) instruction in the context of the entire penalty phase trial. See 494 U. S., at 383-384. As noted earlier, this context is strikingly similar to that in the present case. See Part II-B-1, *supra*. Furthermore, *Boyde* evaluated the prosecutor's comments in the context of defense counsel's arguments, see *id.*, at 386, which was also done by the California Supreme Court in this case. See *Payton*, 3 Cal. 4th, at 1072, 839 P. 2d, at 1049. Finally, the *Boyde* Court also relied on the fact that the prosecution's closing argument

weighed the aggravating evidence against the non-crime mitigating evidence, which reinforced the conclusion that the jury considered this evidence. See 494 U. S., at 385-386. The prosecution made a similar argument in this case, which the California Supreme Court appropriately considered. See 3 Cal. 4th, at 1071-1072, 839 P. 2d, at 1049. The Ninth Circuit's support for its conclusions about *Boyde* would be extraordinarily weak even under the pre-AEDPA de novo standard. Under § 2254(d), its support for granting habeas is inexcusably minimal.

C. General and Specific.

The Ninth Circuit's analysis places the most relevant case in the margins. It consistently misconstrues *Boyde*, while ignoring the many similarities between it and the present case. Those cases it chooses to apply are relevant only at a much higher level of generality. *Lockett* addressed an Ohio death penalty scheme that expressly limited mitigation to three narrow circumstances: the victim inducing the offense, the defendant acting under duress or coercion, and the defendant's mental deficiency. See 438 U. S., at 607-608 (plurality opinion). *Eddings* struck down a death sentence in which the trial judge declared that under Oklahoma law he could not consider the defendant's " 'violent background.' " See *Eddings* v. *Oklahoma*, 455 U. S. 104, 112-113 (1982). In *Skipper v. South Carolina*, 476 U. S. 1 (1986), the trial court ruled that evidence of the defendant's " 'good adjustment' " to jail was inadmissible. See *id.*, at 3. The only decision relied upon by the Ninth Circuit that involved a jury instruction was *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), which held that Texas' scheme of instructing on three special issues did not allow the sentencing jury to give mitigating effect to the defendant's mental retardation and history of abuse. See 492 U. S., at 322-326. Although *Penry* did involve jury instructions, the Texas instructions are very different from California's factor (k) instruction analyzed in *Boyde* and the present case. Compare

id., at 310 (listing Texas' three special issues), with *Boyde*, 494 U. S., at 374 (factor (k)).

Boyde is much closer and more relevant to the present case than the decisions utilized by the Ninth Circuit. While these precedents do establish the general principle relevant to the present case, that the sentencer must be allowed to consider all relevant mitigating evidence in capital cases, see, *e.g.*, *Eddings*, 455 U. S., at 110, the factual differences between these decisions and the present case limit their utility to this general principle. *Boyde*, which addresses the same instruction and a similar factual context, is the most relevant decision by a considerable margin. Although there are differences between it and the present case, this does not require the conclusion that the California Supreme Court's application of *Boyde* is an unreasonable application of the more general rule.

III. The California Supreme Court's decision is a reasonable application of the clearly established Supreme Court precedent.

There is little question that the California Supreme Court correctly identified and applied the relevant legal principles clearly established by this Court. It identified the cases establishing the principle that a capital defendant is entitled to have the sentencer consider all relevant mitigating evidence. See *People* v. *Payton*, 3 Cal. 4th 1050, 1070, 839 P. 2d 1035, 1047 (1992). The case it chose to rely on, *Boyde* v. *California* 494 U. S. 370 (1990), simply applies this general principle to the factor (k) instruction that was before the California Supreme Court. See *id.* at 377; *Payton*, 3 Cal. 4th, at 1070, 839 P. 2d, at 1048. The primary question in this case is whether the California Supreme Court's application of this precedent is reasonable. The answer is yes. The Ninth Circuit's opinion "was nowhere close to the mark when it concluded otherwise." See *Yarborough* v. *Alvarado* 541 U. S.__, 158 L. Ed. 2d 938, 952, 124 S. Ct. 2140, 2150 (2004).

The reasonableness of a state court opinion under § 2254(d) begins by recognizing the habeas petitioner's heavy burden in such cases. Section 2254(d) creates a " 'highly deferential standard' " for state court opinions, see *Woodford* v. *Visciotti*, 537 U. S. 19, 24 (2002) (*per curiam*), which the habeas petitioner bears the burden of overcoming. See *Price* v. *Vincent*, 538 U. S. 634, 640 (2003). Any benefit of the doubt is given to the state court decision under § 2254(d). *Visciotti*, 537 U. S., at 24.

As noted earlier, the similarities between *Boyde* and the present case overshadow the differences. See *supra*, at 16-22. There is no doubt that, consistent with *Boyde*, factor (k) covers the non-crime mitigating evidence presented in this case. See *supra*, at 20. While the prosecutor's comment in the present case is a greater departure from *Boyde*, it is not constitutionally significant. Like the *Boyde* Court, the California Supreme Court evaluated the relevant facts in their proper context.

The fact that all of the mitigating evidence in this case concerns Payton's conversion to Christianity is essential to understanding the California Supreme Court's decision. The *Boyde* Court encountered a parallel situation, where all of the defendant's mitigating evidence was not related to the crime. That fact resonated strongly in *Boyde* and also does so here. *Boyde*'s conclusion, that jurors would read the factor (k) instruction to turn the penalty hearing into a " 'virtual charade,' " 494 U. S., at 383 (quoting *California* v. *Brown*, 479 U. S. 538, 542 (1987)), applies with equal force to this case.

Although the trial court did not specifically instruct the jury that the prosecutor's statements were erroneous, there is no reason to believe that those statements empowered the jury to turn the trial into a charade. Defense counsel vigorously asserted the correct interpretation of factor (k). Arguing last, he told the jury that

> " 'section (k) may be awkwardly worded, but it does not preclude or exclude the kind of evidence that was presented. It's a catch-all phrase. It was designed to include, not exclude, that kind of evidence. [¶] Any jury . . . that was in the position of trying to determine the fairest possible sentences, select them between death or life without possibility of parole, would not only want that kind of evidence but would need it to make an intelligent decision.' The court did not permit the prosecutor to argue in rebuttal." *Payton*, 3 Cal. 4th, at 1072, 839 P. 2d, at 1049.

The trial court responded to the defendant's objection to the prosecutor's remarks by instructing the jury that counsel's argument was " 'not evidence' but 'argument' " which had to be placed in perspective. See *id.*, at 1071, 839 P. 2d, at 1048. Also, the prosecutor's arguments properly suggested how the jury could weigh the aggravating and mitigating evidence. See *id.*, at 1071-1072, 839 P. 2d, at 1049. In this context, it is highly unlikely that a reasonable juror would use the prosecutor's arguments as an excuse to ignore all of the defendant's case, the factor (k) instruction, the prosecutor's own statement about weighing the evidence, the defense counsel's arguments, and the trial court's instruction that arguments of counsel were only arguments.

At the very least, the California Supreme Court's conclusion that there was no constitutional error is reasonable. In *Lockyer* v. *Andrade*, 538 U. S. 63 (2003), the state court's decision was essentially in between two of this Court's precedents, one of which counseled affirmance of the sentence and the other supporting overturning the sentence on Eighth Amendment grounds. See *supra*, at 11-12. The state court's decision to follow the Supreme Court precedent upholding the sentence was reasonable under § 2254(d). See *supra*, at 11-12. The case for reasonableness is much stronger here than in *Andrade*.

Boyde is much closer to the facts of this case than any other Supreme Court opinion. In *Andrade*, if placed on a scale from 1 to 10, the case for affirmance, *Rummel* v. *Estelle*, 445 U. S. 263 (1980), would be a 1, and the case for reversal, *Solem* v.

Helm, 463 U. S. 277 (1983), would be a 10, then Andrade's case would be a 5. In the present case, if *Boyde* is a 1, and the closest contrary case, *Penry* v. *Lynaugh*, 492 U. S. 302 (2002) would be the 10, then Payton's case would be a 1.5. This case shares many similarities with *Boyde* and virtually none with *Penry*. There are no valid reasons for ignoring the close connection between the two.

The Ninth Circuit's decision is what the AEDPA was meant to prevent. The Eighth Amendment law governing mitigating evidence in capital cases is far from clear. For example, *Boyde* clarified an admittedly unclear standard for reviewing jury instructions that are claimed to improperly restrict the consideration of mitigating evidence. See 494 U. S., at 378. Many cases in this area are decided by 5-4 or split opinions. See, *e.g.*, *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982) (5-4). Lacking any definitive pronouncement from this Court concerning the facts presented in this case, the California Supreme Court did the best it could by analogizing the case to the closest Supreme Court opinion, *Boyde*. The Ninth Circuit's decision to call this unreasonable simply punishes a state court for analogous reasoning in order to impose its own view of the correct approach to the case. The AEDPA is designed to prevent mere disagreement with a state court from being the foundation of a grant of habeas corpus when the relevant Supreme Court precedent is ambiguous at best. See *Mitchell* v. *Esparza*, 540 U. S. 12, 124 S. Ct. 7, 11, 157 L. Ed. 2d 263, 270 (2003) (*per curiam*). The case for the reasonableness of the California Supreme Court opinion in this case is not merely strong, it is compelling.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

August, 2004

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation